84-81

No.

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IN THE

Supreme Court of the United States

TERM 1984

RAYMOND T. MORGAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the admission into evidence of expended bullets recovered during a warrantless search and seizure of the "curtilage" of petitioner's home was lawful?

B. Whether alleged incriminating statements attributed to the petitioner should have been introduced into evidence where such statements followed a recantation by the investigating detective of the evidence against the petitioner?

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RAYMOND T. MORGAN,

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PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

OPINION BELOW

The opinion of the Colorado Court of Appeals is set forth in the Appendix, as is its February 2, 1984 Order denying petitioner's Petition for Rehearing. The Colorado Supreme Court denied Certiorari on May 21, 1984. Its Order is included within the Appendix.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

28 U.S.C. § 1254(1): certiorari jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. *United States Constitution Amendment IV.*

No person . . . shall be compelled in any criminal case to be a witness against himself . . . *United States Constitution Amendment V.*

STATEMENT OF THE CASE

Petitioner, Raymond Morgan, was convicted of first-degree murder in connection with the shooting death of Richard Wisse, who was the former spouse of the petitioner's sister. Wisse was shot in the front doorway of his home in Denver on June 15, 1978. The shooting occurred at dusk. The gunman got out of an automobile, accompanied by an accomplice, and walked to the door of the Wisse residence; Wisse was shot when he responded to the doorbell. Wisse died before he could identify his assailant, who, after firing approximately four shots through the door, walked back to the vehicle and drove away.

Evidence at the scene included neighbors who witnessed portions of the events, and a severed human fingertip. Although this fingertip was later destroyed by police carelessness, resulting in its suppression, it was used both in the apprehension of the petitioner and the elicitation of an alleged incriminating statement from him. Petitioner was arrested the next day in Colorado Springs when he sought treatment for a cut finger while visiting friends there; the following day, in custody, petitioner allegedly told a detective he knew he "must have done it" after the officer told him that the severed fingertip could be linked to him through testing.

The testimony of the neighborhood witnesses vacillated. Prior to trial, several of the witnesses could not identify the petitioner as being either of the men involved in the shooting, but at trial, all four of them claimed that Raymond Morgan was the gunman, the "man in the blue suit."

In addition, there was ballistics testimony, indicating that the decedent was killed either by a .38 or a .357 caliber bullet. Two days after the shooting, a police detective talked to a neighbor of the petitioner, who claimed that he had seen

the petitioner fire a gun into the earth in petitioner's yard several days before. The officer then walked into the yard of petitioner's home, claiming to see "furrows" dug into the yard, discovered, and later seized, two .38 caliber bullets. At trial, prosecution experts claimed that these bullets came from the same gun that killed Wisse.

ARGUMENT

A.

THE WARRANTLESS SEARCH AND SEIZURE OF EXPENDED BULLETS FROM THE CURTILAGE OF THE MORGAN RESIDENCE WAS IN VIOLATION OF THE FOURTH AMENDMENT

Two days after the shooting, Detective Diaz of the Denver Police Department was advised by a neighbor of petitioner that several days earlier petitioner had fired two or three shots into his lawn with a handgun. Diaz walked over to the petitioner's property, and there observed two "gouges"; walking onto the property, he stuck his fingers into the gouges and overturned the earth, exposing to both sight and touch a bullet. The gouge was approximately three or four inches in length; Detective Diaz had to stick his whole finger in to expose the bullet. Discovered there were two spent bullets of "large caliber", later opined to have been expelled by the same gun that killed Richard Wisse.

It is uncontroverted that Detective Diaz did not have a warrant when he walked upon petitioner's property, thrust his fingers into the ground, overturned the earth, and exposed the bullets. It is also clear from the evidence at trial that his actions constituted a search, since the bullets could not be seen from off the Morgan property. At the time of the search, petitioner was in custody, and was in no position to destroy any evidence. Likewise, Detective Diaz was not in "hot pursuit" of anything, since the trail was already cold, the shooting having occurred two days earlier.

Before trial, petitioner moved to suppress the bullets, on the basis of the illegal search which uncovered them. The trial court denied the petitioner's motion, finding that by shooting into the ground, the petitioner abandoned any property rights he had in the bullets. The Court of Appeals affirmed on slightly different grounds: that the petitioner had no reasonable expectation of privacy with regard to his front lawn. Petitioner respectfully requests this Honorable Court to grant certiorari to review this clearly erroneous application of Federal law.

The seminal cases in this are the decisions of this Honorable Court in *Hester* v. *United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) and *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). *Hester* marked the first pronouncement by this Honorable Court of the "open fields" doctrine, which excludes "open fields" from Fourth Amendment protection. *Katz* then verbally described those areas which are included within the parameters of the Fourth Amendment, those being places as to which the citizen has a reasonable expectation of privacy.

The interrelationship of *Hester* and *Katz* was the subject of this Honorable Court's opinion on *Oliver* v. *United States*, U.S. , 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). What was left undecided in *Oliver*, however, is the issue presented here: the legality of a warrantless search conducted *within* an area which would customarily fall within the definition of curtilage under common law.

Although the Fourth Amendment protects people, not places, *Katz* v. *United States*, *supra*, this Honorable Court has considered the concept of the curtilage in delineating the boundaries of protected privacy interests. *Oliver* v. *United States supra*; *Hester* v. *United States supra*. *See also Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974). This is so because areas where a property owner has a "legitimate expectation of privacy", *Katz* v. *United States*, *supra*, often parallel property rights. *See, e.g., Wattenburg* v. *United States*, 388 F.2d

853 (9th Cir. 1968); *United States* v. *Van Dyke*, 643 F.2d 992 (4th Cir. 1981). In *Oliver*, this Honorable Court's most recent pronouncement on the subject, the distinction between curtilage, as opposed to open fields, was made clear: no warrant is required for open fields, but the curtilage, or area immediately adjacent to the home, requires a warrant prior to the conducting of any search. *Oliver* v. *United States supra.*

As was stated in *Oliver* v. *United States, supra*, factors considered in determining Fourth Amendment protection include "our societal understanding that certain areas deserve the most scrupulous protection from governmental invasion." While an individual may not have a legitimate expectation for privacy concerning areas remote from the home, it is likewise clear "that certain enclaves should be clear from arbitrary government interference." The home and curtilage are thus treated much differently, given greater protection, than surrounding open fields. *See Oliver* v. *United States, supra. See also Payton* v. *New York*, 445 U.S. 573, 100 S.Ct. 1371, 68 L.Ed.2d 639 (1980).

It is clear that a front yard of a private residence is within the curtilage, that being "the area which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' " *Oliver* v. *United States, supra*. Clearly, areas "immediately adjacent" to the home remain private. *Oliver* v. *United States, supra. See also United States* v. *Van Dyke, supra*; *United States* v. *Williams*, 581 F.2d 451 (5th Cir. 1978); *Care* v. *United States*, 231 F.2d 22 (10th Cir. 1956).

Here, the search was an area clearly within the common law curtilage, that being the front yard of petitioner's home. The governmental intrusion in this case can be supported neither on grounds of abandonment nor on the "open fields" exclusion, for what is buried in a person's yard can hardly be said to have been exposed to public view or abandoned.

For example, in *Wattenburg* v. *United States, supra*, a search was held unlawful which uncovered a "stock pile" of

Christmas trees in defendant's backyard within 35 feet of the house. Here, as in *Wattenburg*, "There can be no doubt that [the accused], in placing the [questioned evidence] this close to his place of residence, sought to protect it from this kind of governmental intrusion."

Likewise, in *Fixel* v. *Wainwright*, 492 F.2d 480 (5th Cir. 1974), the Fifth Circuit held illegal the warrantless seizure of a shaving kit from the enclosed backyard of an apartment building. The shaving kit was located "beneath some rubbish located underneath the tree" in the backyard of the apartment house, and the Court there rejected the prosecution's claim that the defendant had relinquished his privacy to the kit. There, as here, the police had to enter private property to get the questioned evidence, and the search was made without a warrant. There as here, the search should be found illegal.

Despite the seemingly clear line drawn by this court in *Oliver* v. *United States*, *supra*, factual situations concerning the extent of the curtilage will continue to plague this Honorable Court until such time as a pronouncement is made concerning the character of front and backyards of residences. This Court has recently upheld *Hester* as remaining good law after *Katz*; what is now desireable is a clear pronouncement concerning constitutional protections to be accorded yards connected to private residences. Petitioner therefore prays that this Honorable Court will grant certiorari to review this case involving cherished property entitlements.

B.

AN INCRIMINATING STATEMENT ATTRIBUTED TO PETITIONER FOLLOWING CUSTODIAL INTERROGATION SHOULD NOT HAVE BEEN ADMITTED

Petitioner was arrested when he sought medical treatment for a cut to his finger the day after the shooting. The following day, he was interviewed in jail by Detective Welch

of the Denver Police Department. According to Welch, he claimed to have elicited a statement from the petitioner after detailing to the petitioner the evidence the police had against him.

The detective testified at both the suppression hearing and at the trial, and his narration of the alleged statement differed on the two occasions. The gist of the claimed statement, however, was that the petitioner said either that he "did it" or that he "must" have done it based on the overwhelming evidence against him. It is clear that the petitioner was arrested, and in custody, at the time of the statement. It is likewise clear that petitioner told the detective that he did not wish to speak with the detective, prior to making a statement. This was shown by an advisement form which showed that petitioner "refused to talk". Petitioner also made a written request for an attorney before the interrogation, which request was ignored.

However, despite the fact that the petitioner indicated the desire to remain silent, and to speak with an attorney, the detective persisted. Thereafter, petitioner asked what he was charged with, and the detective's response was:

> I explained to him we had evidence in the case that we felt that we could ultimately prove that he was the shooter in this particular case.

The evidence discussed with the petitioner included, for example, the existence of a severed fingertip, found at the scene of the shooting, which allegedly bore petitioner's print, and claimed knowledge of the petitioner's relationship with the decedent. Petitioner's alleged statement followed the recantation of evidence by the detective. The trial court denied suppression, and this ruling was affirmed by the Colorado Court of Appeals, which held that the statements were admissible as having been initiated by the accused.

Petitioner urges this Honorable Court to grant his Petition for Certiorari to review this misapplication of *Rhode Island* v. *Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297

(1980), and other decisions rendered by this Honorable Court.

Petitioner requested a lawyer on his booking slip, but thereafter, was nevertheless taken to a questioning room by the detective, where he again indicated he did not wish to make a statement. Petitioner only asked what he was "in for", or what he was charged with. Rather than simply telling the petitioner the charges, the detective expounded at length regarding the alleged incriminating evidence, and urged petitioner that the evidence that the police had was more than adequate for conviction. This was clearly interrogation, in derogation of petitioner's Fifth Amendment right.

This Honorable Court held in *Rhode Island* v. *Innis*, *supra*, that interrogation extends:

> to words . . . or actions on the part of police officers that they should have known or reasonably likely to elicit an incriminating response.

Of necessity, this test requires some individual considerations of the fact of each case, since no two circumstances are ever the same. However, this Honorable Court's holding in *Rhode Island* v. *Innis*, *supra*, has been reiterated and refined in *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d, 378 (1981) and *Oregon* v. *Bradshaw*, U.S. , 103 S.Ct. 1830, 77 L.Ed.2d 405 (1983). These two later decisions make clear that before further questioning of an accused can continue, the suspect must actually *initiate* further communications, thereby encouraging futher "dialogue with the authorities". *See Oregon* v. *Bradshaw*, *supra*. *See also United States* v. *Montgomery*, 714 F.2d 201 (1st Cir. 1983).

Here, despite a request by the petitioner for an attorney, and despite a clear indication that he did not wish to discuss his involvement, the detective persisted in questioning the petitioner, and thereafter outlined the evidence against him in a clear effort to elicit an incriminating response. In many ways this case is more egregious than *Rhode Island* v. *Innis*,

supra, inasmuch as the setting here was a police interrogation room, and the petitioner in this case had already been in custody over twenty-four hours.

As was stated by this Honorable Court in *Rhode Island* v. *Innis, supra*:

> To limit the ambit of Miranda to express questioning would "place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of Miranda." *Rhode Island* v. *Innis, supra*, n. 3, *quoting Commonwealth* v. *Hamilton*, 445 Pa. 292, 285 A.2d 172 (1971).

There can be little question here but that the detective's remarks were akin to summation of charges, and were designed and intended to elicit an incriminating response. For this reason, the claimed statement was inadmissible as a consequence of impermissible interrogation, since it followed not only an indication of a desire not to make a statement, but also several requests for an attorney.

Here, as in *Edwards* v. *Arizona, supra*, the accused indicated a desire to remain silent. As a result, at that time the interrogation of the petitioner should have ceased. *Edwards* v. *Arizona, supra*. *See also Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Here, the petitioner made a written request for an attorney, indicated that he did not wish to speak with a detective, and repeated orally his desire not to discuss the case. At that point, no further questioning was proper, and the limits of the officer's actions should have been to inform the petitioner simply and clearly of the charges against him.

Instead, the detective embarked on a detailed recitation of incriminating evidence. Such remarks were clearly designed to evoke an incriminating reply, *see Rhode Island* v. *Innis, supra*, and coming as they did following the express invocation of the petitioner's right to remain silent, the alleged incriminating remarks which followed were elicited in

violation of the Fifth Amendment. *Edwards* v. *Arizona*, *supra*. As a consequence, petitioner prays that this Honorable Court issue its Writ of Certiorari, and reverse his conviction.

Respectfully submitted,

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No. 82CA0241

Colorado Court of Appeals

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

RAYMOND T. MORGAN,

Defendant-Appellant.

Appeal from the District Court of the City and County of Denver

Honorable Daniel Sparr,
Judge

JUDGMENT AFFIRMED

DIVISION I
Opinion by CHIEF JUDGE ENOCH
Smith and Kelly, JJ., concur

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Defendant, Raymond T. Morgan, appeals his convictions of conspiracy to commit first degree murder and first degree murder. We affirm.

I.

Defendant contends that the trial court erred in failing to dismiss the charges based on destruction of evidence by the prosecution. We disagree.

Evidence found at the scene included a severed fingertip, from which a fingerprint and blood samples were obtained and subsequently matched to defendant. The fingertip was later destroyed by the police. Applying the three-pronged test set forth in *Garcia* v. *District Court*, 197 Colo. 38, 589 P.2d 924 (1979), the trial court suppressed "the fingertip and all evidence relating thereto, of whatever kind or nature," and, finding that suppression was an adequate remedy, denied defendant's motion to dismiss.

In fashioning a proper remedy for the loss or destruction of evidence, the trial court has broad discretion. *People* v. *Morgan*, 199 Colo. 237, 606 P.2d 1296 (1980). Where, as here, all the evidence relating to the fingertip was suppressed at trial, and defendant was not called upon to explain how, when, or where he lost his fingertip, failure to dismiss the charges did not deprive defendant of due process. *See People* v. *Reese*, 670 P.2d 11 (Colo. App. 1983).

The defendant further contends that the trial court erred in denying his motion to dismiss for denial of speedy trial. We disagree.

After the trial court suppressed all evidence relative to the fingertip and all derivative evidence related thereto, its ruling was appealed by the district attorney to the Supreme Court which affirmed the trial court's findings and upheld the suppression order because of the absence of the transcript of the preliminary hearing. *See People* v. *Morgan*, *supra*. The

defendant thereafter moved the trial court to clarify its suppression order. The trial court entered an order which did not depart from the first order, and the district attorney initiated a second interlocutory appeal based upon that order. *See People* v. *Morgan*, 619 P.2d 64 (Colo. 1980). This second appeal was dismissed by the Supreme Court on the grounds that there was no new suppression order issued in the course of the clarification hearing. The defendant then moved the trial court for dismissal on the grounds that his statutory rights to a speedy trial had been violated because of the period of delay caused by the second appeal. The trial court denied this motion finding that the prosecution did not intentionally cause such a delay nor did it seek any delay to gain an unfair advantage over the defendant.

The statutory provisions of §18-1-405 (6), C.R.S. 1973 (1978 Repl. Vol. 8), and Crim. P. 48(b)(6)(I) provide that, in computing the time within which a defendant shall be brought to trial, the period of delay caused by an interlocutory appeal is to be excluded. In *People* v. *Ferguson*, 653 P.2d 725 (Colo. 1982), the Supreme Court held that an original proceeding is equivalent to an interlocutory appeal and so long as it is initiated in good faith, the speedy trial statute is tolled. Applying this rationale, we hold that even a second interlocutory appeal, if initiated in good faith, tolls the statute regardless of the fact that it is later dismissed by the Supreme Court.

Here, the trial court found the second appeal was in good faith and such a finding of fact, *see Hatfield* v. *Barnes*, 115 Colo. 30, 168 P.2d 552 (1946), will not be disturbed on appeal where there is, as here, supportive evidence in the record. *Page* v. *Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Therefore, the trial court, in making its determination as to whether the speedy trial statute had been violated, properly excluded the delay caused by the second appeal.

III.

Defendant further argues that his alleged incriminating statement should not have been admitted into evidence. We disagree.

The day after the shooting, which occurred in Denver, defendant was arrested in Colorado Springs. The following day, after having been transferred to the Denver City Jail, a police detective requested to speak with defendant. The detective gave defendant his *Miranda* warnings, and defendant stated that he understood each of these rights. Defendant then wrote "refuse to talk" on the printed advisement form next to the statement that the subject wishes voluntarily to talk to the police. When the detective then started to leave defendant stated, "I would like to know what I'm in for, what I'm charged with, and if you can tell me what happened." In response, the detective explained in detail what the charges were and what evidence existed to establish the charges. After this explanation, defendant made the following statement, "I know I must have done it. I'd like to talk to you and get this cleared up, but I feel I should talk to my lawyer first." After this statement was made by defendant, the detective left without having asked any questions.

When an accused declines to answer questions or requests the presence of an attorney, all questioning of the accused must cease unless the accused himself initiates further communication, exchanges, or conversations with the police. Here, as in *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981), the defendant initiated the further conversation with the detective. *See Oregon* v. *Bradshaw*, ____ U.S. ____, 103 S.Ct. 1830, 77 L.Ed. 2d 405 (1983).

Since the conversation was initiated by the defendant, the next issue is whether the detective's response to the defendant's questions constitutes custodial interrogation. Interrogation consists of either express questioning or its functional equivalent, *i.e.*, any words or actions on the part of the police that the police should know are reasonably likely to

elicit an incriminating response from the suspect. Here, considering the circumstances, we conclude that the detective's statements regarding the charges and the evidence establishing the charges were not the functional equivalent of questioning.

Therefore, because defendant, after being properly advised of his rights, initiated a conversation with the detective and the detective's response was not custodial interrogation, the trial court did not err in admitting the defendant's statements into evidence. *See People* v. *Pierson*, ____ P.2d ____ (Colo. No. 81SC211, announced October 11, 1983).

IV.

The defendant also argues that the destruction of rough notes of this interview with the detective denied him due process of law. We disagree.

After the interview, the detective returned to his office and made rough notes of the defendant's statements. These notes were later incorporated into a supplemental report. At a suppression hearing prior to trial, the detective was asked whether he still had these notes to which he responded in the affirmative. However, it was not until three years later, at the trial, that the defendant requested the notes which, unlike all the other rough notes made in the investigation, had been either lost or destroyed.

The state has a duty to employ regular procedures to preserve discoverable evidence such as rough notes of a defendant's statement. However, the destruction of the notes by itself does not constitute a violation of due process unless the evidence is constitutionally material. In the context of a completed trial, constitutional materiality means evidence which, when evaluated in light of the entire record, likely would have affected the outcome of the trial. *People* v. *Shaw*, 646 P.2d 375 (Colo. 1982).

The record reveals that the notes were not made contemporaneously with the defendant's statement but contained only the detective's recollection of what the defendant had stated. The detective testified that the supplemental report was accurate. In addition, there is no indication that the notes contained anything favorable to the defendant, and the detective was vigorously cross-examined about any discrepancy between his testimony at the suppression hearing and his testimony at the trial regarding defendant's statement. Although we do not condone the destruction of rough notes made following an interview with a defendant, we find that, in light of the entire record, the evidence here was not constitutionally material, and therefore, the defendant was not denied due process.

V.

Defendant's final contention is that the trial court erred in failing to suppress the bullets seized from the front yard of the residence where he lived with his mother and two other tenants. We disagree.

A few days after defendant's arrest, another detective was in defendant's neighborhood looking for a vehicle. Upon questioning neighbors, he learned that one evening, while it was still quite light, defendant had come out of his residence and, in front of witnesses, had shot bullets into the front lawn. The detective then went to the public sidewalk next to the residence and saw two furrows in the front lawn. He walked out on the lawn and, by putting his finger down one furrow, overturned the first bullet. The second bullet was later seized allegedly upon a tenant's consent.

The trial court found that defendant had no reasonable expectation of privacy with respect to the front lawn and did not suppress the bullets. We agree with the court's ruling.

The application of the Fourth Amendment depends upon whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of

privacy" that has been invaded by government action. *Smith* v. *Maryland,* 442 U.S. 735, 99 S Ct. 2577, 61 L.Ed. 2d 220 (1978). This inquiry normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy" and the second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" *Smith* v. *Maryland, supra.*

Where, as here, a defendant openly, in daylight, and before witnesses, fires bullets into a front lawn, which is not enclosed, is open to public view, and is subject to access by other tenants of the residence, the defendant has not, by his conduct, exhibited an actual expectation of privacy with respect to the bullets. Therefore, in this case, defendant can assert no legitimate interest protected by the Fourth Amendment, and the trial court properly admitted the bullets in evidence.

Judgment affirmed.

JUDGE SMITH and JUDGE KELLY concur.

Case Number 82CA0241

In the

Court of Appeals

OF THE STATE OF COLORADO

THE PEOPLE
Plaintiff-Appellee

v.

ORDER

Raymond T. Morgan,
Defendant-Appellant.

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby denied. Unless otherwise ordered, mandate will issue February 9, 1984.

BY THE COURT,

DATED: February 2, 1984

If certiorari to the Supreme Court is planned and a stay of issuance of mandate desired, petition for such such stay must be filed in the Court of Appeals prior to the above date of issue.

Case No. 84SC88

Supreme Court, State of Colorado

CERTIORARI TO THE COLORADO COURT OF APPEALS;
No. 82CA0241

RAYMOND T. MORGAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of the Court of Appeals,

It Is This Day Ordered that said Petition for Writ of Certiorari shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, MAY 21, 1984.

cc: Mac V. Danford, Clerk
Colorado Court of Appeals

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No. 84-81

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RAYMOND T. MORGAN,

PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF COLORADO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the warrantless seizure of spent bullets from petitioner's front yard was lawful.

2. Whether this Court has jurisdiction to review an issue that petitioner failed to present to the Colorado Supreme Court on certiorari.

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No. 84-81

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RAYMOND T. MORGAN,

PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF COLORADO

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

OPINION BELOW

In his Petition for Writ of Certiorari to the Colorado Court of Appeals, petitioner failed to ask the Colorado Supreme Court to review the issue of whether statements he made to a detective were properly admitted at trial. [Question B presented by

petitioner, Page 6 of Petition.] The Colorado Supreme Court's order denying certiorari pertains, therefore, only to petitioner's Question A.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Petitioner erroneously relies on 28 U.S.C. 1254(1) to invoke the jurisdiction of this Court.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent submits the following to supplement and clarify petitioner's Statement of the Case.

Petitioner was found guilty by a jury of both conspiracy to commit murder in the first degree and first degree murder.

Three neighbors of the victim witnessed the murder and identified petitioner at trial as the person who

shot Richard Wisse. They each testified that they had not definitely identified petitioner prior to trial because they were scared. A fourth neighbor identified petitioner as one of the two men whom he saw get out of a car and walk toward the victim's house shortly before the shooting. After hearing several gunshots, he saw petitioner and the other man return to the car and drive away.

On June 15, 1978, approximately two hours before the murder, petitioner fired a gun two or three times into his front yard. Two of his neighbors saw him firing the gun, and on June 17, 1978, one of the neighbors gave this information to the investigating homicide detective. As a result, two expended bullets were recovered from "gouges" in petitioner's front yard.

SUMMARY OF ARGUMENT

The Fourth Amendment protects people, not places. Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). Fourth Amendment analysis is now based on a legitimate or reasonable expectation of privacy test rather than on property concepts. Here, petitioner's actions were the antithesis of any expectation of privacy: he fired a gun two or three times into his front yard with his neighbors watching.

Pursuant to 28 U.S.C. § 1257, this Court lacks jurisdiction to review petitioner's Question B in his Petition for Writ of Certiorari. Petitioner failed to present the question to the Colorado Supreme Court on certiorari, and thus there is no final judgment by the highest state court.

ARGUMENT

A. THE WARRANTLESS SEIZURE OF SPENT BULLETS FROM PETITIONER'S FRONT YARD DID NOT VIOLATE PETITIONER'S REASONABLE EXPECTATION OF PRIVACY AND WAS, THEREFORE, CONSTITUTIONAL.

On June 15, 1978, the day of the murder of Richard Wisse, in daylight and in front of his neighbors, petitioner fired a gun two or three times into his front lawn. The front yard was not enclosed, but open to public view, and was used by other tenants of the home as well as by the public.

On June 17, 1978, one of the neighbors who saw petitioner firing the gun gave this information to an investigating homicide detective. The detective went to petitioner's residence and from the public sidewalk saw two "gouges" in the front lawn. Two expended bullets were recovered from the gouges.

Prior to trial, petitioner moved to suppress the bullets on the ground of an illegal search, and the trial court denied the motion. The trial court's ruling was principally based on petitioner's lack of expectation of privacy, rather than on abandonment as alleged by petitioner.

The trial court ruled that, under the facts of the instant case, petitioner exhibited no reasonable or legitimate expectation of privacy when he publicly shot the bullets into his front yard. Hence, the warrantless seizure of the bullets did not violate petitioner's Fourth Amendment rights. The Colorado Court of Appeals agreed with the trial court's ruling.

Petitioner now asks this Court to view the search in light of the character of front and backyards of residences

as constitutionally protected curtilage requiring a warrant prior to any search.

In Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the parties' arguments were based on whether a telephone booth could be characterized as a constitutionally protected area. The Katz court declined to address the issue of whether a given "area" was constitutionally protected, because the scope of the interest protected by the Fourth Amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy.

Consistent with Katz, this Court uniformly has held that application of the Fourth Amendment depends on whether the person invoking its privilege has a justifiable, reasonable, or legitimate

expectation of privacy that has been violated by the government. Rawlings v. Kentucky, 448 U.S. 97, 104-106, 100 S.Ct. 2556, 2561-2562, 65 L.Ed.2d 633 (1980); Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978); United States v. Chadwick, 433 U.S. 1, 7, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977). This principle was recently reiterated in Illinois v. Andreas, ___ U.S. ___, 103 S.Ct. 3319, 3323 (1983):

> The Fourth Amendment protects legitimate expectations of privacy rather than simply places. If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no "search" subject to the Warrant Clause.

Thus, the proper question in this case is not which land surrounding a house is constitutionally protected, but whether petitioner exhibited a reasonable expectation of privacy which was

violated by an unjustified government intrusion.

The determination of whether a defendant has a legitimate expectation of privacy involves two distinct questions as set forth in Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979):

> The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy,"...whether, in the words of the Katz majority, the individual has shown that "he seeks to preserve [something] as private."... The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'"... whether, in the words of the Katz majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances.

Accord: United States v. Knotts, ___ U.S. ___, 103 S.Ct. 1081 (1983).

In applying this analysis to the instant case, we assert that petitioner

had no subjective nor objective expectation of privacy. Petitioner took no precautions to maintain his privacy nor even to conceal the fact that he was firing a gun in his front yard. The bullets were found in petitioner's front yard where any passerby could see the holes, and petitioner made no attempt to cover or smooth over the holes. What a person knowingly exposes to the public is not subject to Fourth Amendment protection. Katz v. United States, 389 U.S. at 351, 88 S.Ct. at 511.

As Mr. Justice Harlan stated in his Katz concurrence (389 U.S. at 361, 88 S.Ct. at 516):

> [A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited.

Respondent avers that petitioner patently demonstrated no subjective expectation of privacy when he fired the bullets into his front yard in the plain view of his neighbors.

Objectively, there was no reasonable expectation of privacy in the bullets in petitioner's front yard which is an area open to public view. Further, the detective was able to observe the gouges from the sidewalk which is open to public use, thus negating any reasonable expectation of privacy in regard to the observations made. Under these circumstances, no "search" occurred, because no expectation of privacy that society would consider reasonable was infringed. United States v. Jacobsen, ___ U.S. ___, 104 S.Ct. 1652, 1656 (1984).

Petitioner relies on Oliver v. United States, ___ U.S. ___, 104 S.Ct.

1735 (1984), to support his contention that a warrant is required before conducting any search of the curtilage. Although the Oliver Court recognized that Fourth Amendment protection has been extended to the curtilage, consistent with Katz, the Court stated (Reporter at 1743):

> The existence of a property right is but one element in determining whether expectations of privacy are legitimate.

The Court noted that since Katz, the touchstone of Fourth Amendment analysis has been the question whether a person has a constitutionally protected reasonable expectation of privacy -- not only subjectively, but a privacy expectation that society is also prepared to recognize as reasonable.

And as the Oliver Court quoted from Rakas v. Illinois, 439 U.S., at 144

n. 12, 99 S.Ct., at 431 n. 12 (Reporter at 1744):

> [E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon.

Petitioner's reliance on Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968) and Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974), is also misplaced. Both cases are readily distinguished, because the seizures were made from backyards that are not open to public view or use and thus carry an expectation of privacy. See United States v. Van Dyke, 643 F.2d 992 (4th Cir. 1981), where the court narrowly ruled that officers' observations were made from the curtilage, but stated that under this Court's direction, the substantive question to be considered would be whether a defendant had a legitimate

expectation of privacy in the area searched.

In sum, because petitioner's activities occurred on his front lawn, in public view, no legitimate privacy interest attached.

B. THIS COURT LACKS JURISDICTION TO REVIEW QUESTION B OF THE PETITION FOR CERTIORARI, BECAUSE PETITIONER FAILED TO EXHAUST HIS STATE REMEDIES.

After petitioner's convictions, he appealed to the Colorado Court of Appeals, which affirmed the judgments. Petitioner then unsuccessfully petitioned for further discretionary review in the Colorado Supreme Court, but did not present the issue of whether statements he made to the investigating detective were properly admitted at trial. Hence, petitioner failed to exhaust his state remedies, and his Question B is not properly before this

Court. Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), rehearing denied 373 U.S. 905, 83 S.Ct. 1288.

Banks v. California, 395 U.S. 708, 89 S.Ct. 1901, 23 L.Ed.2d 653 (1969), rehearing denied 396 U.S. 869, 90 S.Ct. 36, is dispositive, because there petitioner Banks also did not ask the state supreme court to review the judgment entered by the state court of appeal. This Court held:

> Therefore, the decision of the Court of Appeal is not a "[f]inal judgment * * * rendered by the highest court of a State in which a decision could be had * * *." 28 U.S.C. § 1257, and we lack jurisdiction to review it.

We aver that petitioner cannot invoke the jurisdiction of this Court under 28 U.S.C. § 1257 as to Question B, because there is no final judgment rendered by the Colorado Supreme Court.

CONCLUSION

Respondent, the People of the State of Colorado, respectfully ask this Court to deny the petition for certiorari.

Respectfully submitted,

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September 6, 1984

Certificate of Service

Pursuant to Sup. Ct. R. 28.5(b), I hereby certify that 3 copies of the foregoing respondent's Brief in Opposition to Petition for Writ of Certiorari have been placed in the United States mail on September 6, 1984, properly addressed, to:

Scott H. Robinson
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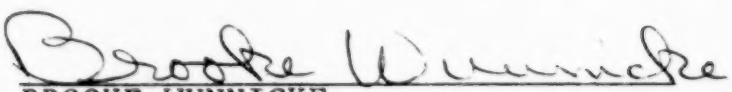

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